

1.

No.33 of 1970

IN THE JUDICIAL COMMITTEE

OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

R. SAMBASIVAM

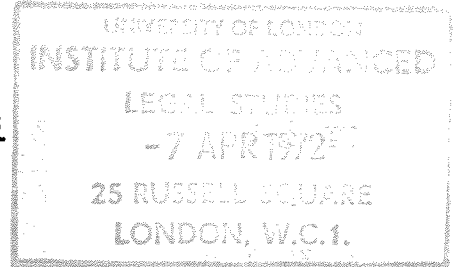
Appellant

- and -

1. THE PUBLIC SERVICES
COMMISSION

2. THE GOVERNMENT OF THE
FEDERATION OF MALAYA

Respondents



10

CASE FOR THE APPELLANT

Record

1. This is an appeal from a Judgment of the Federal Court of Malaysia (Ong Hock Thye, C.J., Gill, F.J., and Ali, F.J.) dated the 10th day of September 1969, dismissing an appeal by the Appellant herein from a Judgment of the High Court in Malaya at Kuala Lumpur (Raja Azlan Shah, J.) dated the 7th day of February 1969, dismissing a motion for an order of certiorari to quash the decision of the Public Services Commission terminating the Appellant's appointment as a Junior Assistant Commissioner for Labour in the Government of the Federation of Malaysia.

pp.67-73

pp.47-53

20

2. By Notice of Motion dated the 11th day of October 1968, pursuant to leave having been given on the 28th day of August 1968, the High Court in Malaya at Kuala Lumpur was moved:-

p.32 1.11-
p.33 1.29
p.31-p.32
1.10

30

"(a) For an order of certiorari to remove into this Honourable Court and quash a decision made by the Public Services Commission and communicated by letter dated the 30th April 1968 terminating forthwith the appointment of the Applicant as a Junior Assistant Commissioner for Labour in the Government of the Federation of Malaysia.

p.33 11.7-
23

Record

(b) By way of a consequential relief for a declaration in lieu of mandamus that the Applicant is entitled to be reinstated in his employment as Junior Assistant Commissioner for Labour.

(c) The costs of this application be costs in the cause or in the discretion of the Court."

pp.3-8

3. The said Motion was supported by an Affidavit affirmed by the Applicant on the 21st day of June 1968 and filed in support of the application for leave to issue the Notice of Motion. An Affidavit in opposition to the Motion was filed by Abu Hanifah Bin Long, the Assistant Secretary (Promotion/Discipline), Public Services Commission.

10

p.34 1.8-
p.36

4. The brief facts of the matter were summarised by the learned trial Judge as follows:-

20

p.47 1.28-
p.49 1.10

"The applicant was on the permanent establishment in Division II of the Public Service. On 8th December, 1966, the Secretary to the Commission wrote to the applicant through the Secretary of his Ministry that his "conduct appears to the Head of the Department to merit dismissal" and called upon him to exculpate himself, and in accordance with General Order 38(c) Cap.D, a Committee of Enquiry was set up to investigate the complaints against the applicant. The Committee sat on 27th, 28th and 29th November, 1967, when hearing was adjourned, and resumed on 5th, 6th and 7th March, 1968. The proceedings were conducted by Enche S. Kumar the Commissioner for Labour, and Enche M. Shankar represented the applicant.

30

On 28th November, 1967, in the course of cross-examination of Enche S. Kumar, the following evidence was elicited:

Q. "The letter dated the 8th December 1966 to Sivam that his conduct appeared to the Head of Department to merit dismissal was sent through the Setia Usaha Kementerian Buroh? A. Yes.

40

Q. Dato Yeap Kee Aik was then the Secretary to the Ministry of Labour?
A. Yes.

Q. The letter was sent through him because it was he who reported to the Public Services Commission that it appeared to him that Sivam's conduct merited dismissal? A. Yes.

10

Q. Did he make this report verbally or in writing? A. He did it in writing by a letter dated the 26th October 1966.

Q. So the decision to initiate proceedings against Sivam was his and his alone?
A. Yes.

Q. But it is you who is Head of Department and not Dato Yeap Kee Aik? A. Yes, I am Head of Department and not Dato Yeap.

20

When the above evidence was elicited, Enche Shankar put in a written submission on 29th November 1967, to the effect that the proceedings initiated against the applicant were ultra vires. The Committee adjourned to consider the submission. On 13th January 1968, the Secretary to the Commission in reply to the applicant's letter of 28th December, 1967, indicated that the Committee had decided to defer its decision pending completion of the Enquiry. It is established that the said decision was never communicated to the applicant. On 30th April, 1968, the applicant was notified of his dismissal."

30

5. The following four grounds were relied on in support of the application:-

"(i) That the proceedings before the Committee of Inquiry of the Public Services Commission were improperly instituted;

p.37 l.24-
p.38 l.2

(ii) That the Committee of Inquiry had failed to consider matters preliminary or collateral to the matter before it and affecting its jurisdiction;

Record

(iii) That the proceedings before the Committee of Inquiry are void on the ground that they are contrary to the rules of natural justice;

(iv) That the Committee of Inquiry improperly admitted hearsay evidence against the charges preferred against the Applicant."

6. In support of ground (i) it was contended that under Regulation 38 of General Orders, Cap.D. the only person who is competent or qualified to set the Disciplinary Authority in motion is the Head of Department. The said Regulation provides:- 10

"38. If the conduct of an officer on the pensionable establishment in Division I or II of the Public Service appears to the Head of Department to merit dismissal, the following procedure will be adopted, unless the method of dismissal is otherwise provided for either in these Regulations, or by special legislation". 20

It was urged that this Regulation was violated because the proceedings before the Committee of Inquiry were instituted not by Mr. Kumar, the Commissioner for Labour who was the Head of Department, but by the Secretary to the Ministry, Dato Yeap Kee Aik.

p.49 11.41-
43 7. In his Judgment, the learned trial Judge agreed "that these procedural provisions are to be treated as mandatory and therefore must be strictly construed". He went on to hold, however, it is submitted wrongly, as follows:- 30

p.50 11.9-
50 "It is true that Enche Kumar is the Head of the Department of Labour and not Dato Yeap Kee Aik, but the Department of Labour is one of many Departments in the Ministry of Labour. The overall administrative head of the Ministry is the Secretary. In the light of this observation the meaning to be attached to the provisions of G.O. 3 (g) Cap.A is quite clear. The Secretary to the Ministry of Labour is also Head of Department. G.O. 3 (g) reads: "The term Head of Department" shall be deemed to 40

include a "Secretary to a Minister or Ministry and the Principal "Establishment Officer in respect of services "listed in sub-paragraph (a) of General Order 41". It is said that the definition of "Head of Department" as defined in G.O. 3 (g) Cap.A which deals with appointments and promotions is not applicable to the provisions under Cap.D i.e., conduct and discipline regulations. The fallacy lies in assuming that there are two different Heads of Departments one dealing with appointments and promotions and the other dealing with disciplinary proceedings. It is obvious that is not the intention of the General Orders. It is then urged that the said regulation concerns services listed in sub-paragraph (a) of G.O. 41 41 Cap.A and the applicant is not a member listed under the said paragraph. In my opinion that is a misinterpretation of the said regulation. Only the services listed in sub-paragraph (a) of G.O.41 Cap.A come within the portfolio of the Principal Establishment Officer while other services come under the administrative heads of the various Ministries. The true view is that while the mandatory provisions of G.O. 38 Cap.D must be strictly construed, the phrase "appears to the Head of Department to merit dismissal" which precedes those provisions is only a machinery providing for the mode in which the question which can only be decided by the Disciplinary Authority is to come before them. There can be no doubt that the power of dismissal remains solely with the Disciplinary Authority."

8. The Appellant respectfully submits that the above findings are erroneous because:-

- 40 (a) there was no evidence before the learned trial Judge as to the numerous departments in the Ministry of Labour or that the overall administrative head of the Ministry is the Secretary. The only evidence was that of Mr. Kumar that he and not the Secretary was the Head of the Department;
- (b) the interpretation of the term "Head of

Record

Department" in G.O. 3 (g) Cap.A is restricted to Chapter A and does not apply to Chapter D;

- (c) having held that the procedural provisions are mandatory, it was not open to the learned trial Judge to hold that any other procedure was valid.

pp.51-53

9. The learned trial Judge also dismissed the other grounds (para 5 (ii) (iii) and (iv) relied on in support of the application.

10

pp.54-64

10. The Appellant appealed to the Federal Court of Malaysia relying on the same grounds as those urged in the court below.

p.70
11.6-8

11. On the main question relating to the violation of the provisions of Regulation 38 of G.O. Cap.D, the learned Chief Justice agreed with the Judge below "that the procedural provisions set out thereunder should be treated as mandatory and strictly observed". After quoting what the learned trial Judge had said, he held, it is submitted wrongly, as follows:-

20

p.71
11.7-31

"With respect I agree. Putting it another way, regulation 38, in my view, ought properly to be construed, as the Judge did, in two parts, even though they are not dichotomous. First, there is the complaint; if accepted, it is followed by the inquiry. Impeachment proceedings, it was argued, might be initiated even by an office boy, unless the sole repository of the power to do so is held as restricted, in terms of the regulation, to the Head of Department. This argument by reductio ad absurdum cuts both ways. "Head of Department" not only bears the primary meaning, but also by implication excludes any irresponsible person. The Secretary to the Ministry, of course, is a responsible person, at least the equal in official status of a Head of Department. Moreover, he cannot set the machinery in motion, without disclosing adequate grounds of complaint, any more than the other can. I think both reasonableness as well as the object and intent of the provision should guide its interpretation. In my view the iron-clad rigidity

30

40

of the procedure to be observed in the inquiry does not extend to what precedes it, namely, the initiation by complaint. Accordingly the proceedings were not invalid on that account."

10 12. The Appellant respectfully submits that having held that the procedural provisions in Regulation 38 were mandatory, it was not open to say that the "procedure to be observed in the inquiry does not extend to what precedes it, namely, the initiation by complaint".

p.71 11.28-
30

13. The learned Chief Justice also agreed with the trial Judge that the other grounds urged by the Appellant relating to the non-observance of the rules of natural justice, bias and reception of hearsay evidence, should fail. The appeal was accordingly dismissed with costs.

p.71 1.34-
p.73

20 14. The Appellant respectfully submits that the Judgments of the High Court and the Federal Court are wrong and that this appeal should be allowed with costs for the following among other

R E A S O N S

1. BECAUSE the proceedings before the Committee of Inquiry of the Public Services Commission were improperly instituted;
2. BECAUSE under Regulation 38 of G.O. Cap.D the only person competent or qualified to set the Disciplinary Authority in motion is the "Head of Department";
3. BECAUSE the proceedings in this case were initiated not by the Head of Department, Mr. Kumar, but by the Secretary to the Ministry, Dato Yeap Kee Aik;
4. BECAUSE there was no evidence before the learned trial Judge as to the numerous departments in the Ministry of Labour or that the overall administrative head of the Ministry is the Secretary;
5. BECAUSE the interpretation of the term "Head of Department" in G.O. 3 (g) Cap.A is restricted to Chapter A and does not apply to Chapter D;

Record

6. BECAUSE the procedural provisions in the said Regulations are mandatory;
7. BECAUSE both courts below having held that the said procedural provisions are mandatory and must be strictly construed wrongly went on to hold that this did not extend to the initiation of the proceedings;
8. BECAUSE the Committee of Inquiry had failed to consider matters preliminary or collateral to the matter before it and affecting its jurisdiction; 10
9. BECAUSE the Appellant was never informed of the decision of the Committee on the question of objection to its jurisdiction, which failure resulted in a serious procedural defect and substantial injustice;
10. BECAUSE there was a further breach of the rules of natural justice in that the letter of Dato Yeap Kee Aik, dated 26th October 1966, contained allegations of misconduct against the Appellant which were not made the subject-matter of the charges preferred against him, with the result that the Public Services Commission was influenced by extraneous considerations without giving him an opportunity to explain; 20
11. BECAUSE the Committee of Inquiry improperly admitted hearsay evidence;
12. BECAUSE the Judgments of the Courts below are wrong. 30

E.F.N. GRATIAEN

EUGENE COTRAN

No.33 of 1970

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL
COURT OF MALAYSIA

B E T W E E N :

R. SAMBASIVAM Appellant

- and -

1. THE PUBLIC SERVICES
COMMISSION
2. THE GOVERNMENT OF THE
FEDERATION OF MALAYA

Respondents

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
6/8, Westminster Palace
Gardens,
London, S.W.1.